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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 1104

E. G. SWINDLEHURST,
Petitioner,

vs.

AMERICAN FIDELITY FIRE INSURANCE COMPANY,
a foreign insurance company, and
HENRY SALES, d/b/a Sales Welding,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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(Figures in parentheses followed by "a" refer to pages in petitioner's Appendix "A".)

QUESTIONS PRESENTED FOR REVIEW

Respondent American Fidelity Fire Insurance Company does not accept petitioner's question presented. A more concise statement of the question presented follows:

> Where a state appellate court sets aside a trial court jury verdict for a plaintiff and orders the entry of a judgment of no cause for action for a defendant on a determination by the state appellate court that there was no question of fact to be submitted to the jury because as a matter of law plaintiff's claim was barred

by res judicata, has the plaintiff been denied the right of trial by jury contrary to the Seventh Amendment to the Constitution of the United States?

CONCISE STATEMENT OF THE CASE

The present case (Ingham County Case No. 18,884) is petitioner's third suit against respondent American Fidelity Fire Insurance Company. The three suits arose from an accident which occurred in September of 1950 and which involved petitioner's tractor and trailer. The tractor and trailer were placed with separate garages for repairs (2a). Swindlehurst felt the repairs were unsatisfactory and he refused to pay the $250 deductible due each repairman. He also refused to take possession of his vehicles (2a).

In July of 1951 Swindlehurst commenced Ingham County Case No. 15,922 (2a). In this suit he alleged a breach of the contracts of insurance (2a). At the conclusion of Swindlehurst's proofs American Fidelity Fire Insurance Company's motion for directed verdict of no cause for action was granted on the ground that plaintiff failed to present proof as to damages (2a). Swindlehurst started Ingham County Case No. 18,020 against American Fidelity Fire Insurance Company in April of 1956 (3a). This latter suit was for breach of contract and loss of profits (3a). The trial court ordered the entry of a judgment of no cause for action for American Fidelity Fire Insurance Company on the ground that the issues had been adjudicated in Case No. 15,922 (3a). No appeal was taken.

Prior to the commencement of Case No. 18,020, the repairmen of the tractor and trailer sold the vehicles pursuant to the provisions of the garage-keeper's lien statute (*CL* 1948, Sec. 570.301 et seq. [*Mich Stat. Anno.*, Sec. 9.1711 et seq]). The tractor was sold on April 12, 1954 and the trailer on October 19, 1955 (3a).

The instant case was started in September of 1957 (3a). This is a suit for conversion of the tractor and trailer. The suit against the repairman of the tractor was dismissed, leaving only the suit against American Fidelity Fire Insurance Company and the repairer of the trailer, Henry Sales (3a-4a). American Fidelity Fire Insurance Com-

pany's motion to dismiss on the grounds of res judicata and statute of limitations was denied by the Ingham County trial court (4a). The Michigan Supreme Court denied American Fidelity Fire Insurance Company's application for leave to appeal from that decision (4a).

This case was tried before an Ingham County jury in November and December of 1962 and resulted in a verdict for petitioner in the amount of $42,000 against American Fidelity Fire Insurance Company alone on the tractor, and for petitioner in the amount of $14,000 against American Fidelity Fire Insurance Company and Sales on the trailer (4a). On August 31, 1964 the trial court ruled on the motions for judgment notwithstanding the verdict and for a new trial (4a). The trial court held that a new trial would be granted unless Swindlehurst filed a remittitur of $38,000 of the verdict against American Fidelity Fire Insurance Company on the tractor, and a remittitur of $10,000 of the verdict against American Fidelity Fire Insurance Company and Sales on the trailer (4a). The motion for judgment notwithstanding the verdict was denied. Swindlehurst appealed from the trial court's ruling (4a). Both American Fidelity Fire Insurance Company and Sales cross-appealed on the failure of the trial court to grant the various motions for directed verdicts, the motions to dismiss, and the motions for judgment notwithstanding the verdict (4a).

The Michigan Court of Appeals held that the matters in controversy between Swindlehurst and American Fidelity Fire Insurance Company had been fully adjudicated in Case No. 18,020, and that the trial court should have granted American Fidelity Fire Insurance Company's motion to dismiss (6a). In addition, the Court of Appeals held that Swindlehurst failed to establish that Sales did not comply with the garage-keeper's lien statute, and, consequently, he did not establish a prima facie case of conversion against Sales (6a). Sales' motion for a directed verdict should have been granted (6a).

On July 11, 1966 the Michigan Supreme Court denied Swindlehurst's application for leave to appeal (6a-7a). The Michigan Supreme Court on November 7, 1966 denied Swindlehurst's application to reconsider the order of July 11, 1966 denying leave to appeal (10a-11a).

ARGUMENT

A. Seventh Amendment Inapplicable to Civil Trials in State Courts

On page 12 petitioner states that the "principal reason for granting the writ is that the appellant was denied the right to a jury decision by action of the State Court, that violated the SEVENTH AMENDMENT to the Constitution of the United States." The within cause was tried in a state court. It is well settled that a litigant in a state court civil action has no constitutional right to a jury trial under the Seventh Amendment or under the due process clause of the Fourteenth Amendment. *Iacaponi v. New Amsterdam Casualty Company,* (D.C., W.D. Pa., 1966) 258 Fed. Supp. 880.

In *Minneapolis & St. Louis Railroad Company v. Bombolis* (1915), 241 U.S. 211, 60 L. Ed. 961, 36 Sup. Ct. 595, the United States Supreme Court stated on page 217:

> "* * * that the Seventh Amendment applies only to proceedings in courts of the United States and does not in any manner whatever govern or regulate trials by jury in state courts or the standards which must be applied concerning the same."

In *Olesen v. Trust Company of Chicago,* (7th Cir., 1957) 245 F. 2d 522, the Court said on page 524:

> "It is clear there is no federal question involved in the case at bar. The Seventh Amendment of the United States Constitution applies to trials in the United States Courts. *Bute v. People of State of Illinois,* 333 U.S. 640, 657 (footnote), 68 S. Ct. 763, 92 L. Ed. 986. Trial by jury in civil actions in state courts may be modified by a state or abolished altogether. * * *"

See also *Gustafson v. Peck,* (D.C., N.D. Iowa, W.D., 1963) 216 Fed. Supp. 370.

This petition is predicated on the Seventh Amendment guarantee of trial by jury. The federal courts have con-

sistently held that the right of trial by jury is inapplicable to civil trials in state courts. This alone is grounds for denial of the petition.

B. A State Appellate Court Can Set Aside a Jury Verdict Where No Fact Question Exists

It is fundamental that a state trial court can hear and determine motions to dismiss, and that a state appellate court can review the determination by the trial court. Rule 18 of the then applicable Michigan Court Rules of 1945 (see *Honigman, Michigan Court Rules Annotated,* p. 146-147) provided that a defendant, for various reasons, could file a motion to dismiss. One of the grounds for a motion to dismiss was prior adjudication (Rule 18, Sec. 1(e)). American Fidelity Fire Insurance Company filed a motion to dismiss this cause on October 14, 1957. This motion was based on res judicata and statute of limitations (4a). The trial court denied this motion (4a). American Fidelity Fire Insurance Company then filed its application for leave to appeal. This was denied by the Michigan Supreme Court (4a).

In this case the Michigan Court of Appeals in 1966 determined as a matter of law that the plaintiff's cause of action had previously been litigated by a court of competent jurisdiction (6a). The trial court, therefore, erred in not granting American Fidelity Fire Insurance Company's motion to dismiss on the ground of res judicata (6a). In denying Swindlehurst's application for leave to appeal, the Michigan Supreme Court held that the result reached by the Court of Appeals was correct (6a-7a). The Michigan Supreme Court and the Michigan Court of Appeals were eminently correct.

The doctrine of res judicata proclaims that at some point there must be an end or finality to litigation. In *Banks v. Billups* (1958), 351 Mich. 628, the Michigan Supreme Court stated on page 635:

> "* * * It is not intended that a controversy shall be tried over and over, but rather that one suit, in which issues are tried and disposed of on the merits,

must conclude the litigation. If a party fails in making a full presentation of his case, whereby the judgment has passed against him, he cannot be permitted to make a better showing in a new suit. * * *."

Petitioner's tractor was sold on foreclosure sale on April 12, 1954, and the foreclosure sale on the trailer occurred on October 19, 1955 (3a). Those sales divested Swindlehurst of any and all interest in the tractor and trailer (*CL* 1948, Sec. 570.301 et seq. [*Mich. Stat. Anno.*, Sec. 9.1711 et seq.]). Nothing that subsequently happened concerning the tractor and trailer had any effect whatsoever on Swindlehurst. If a conversion of either vehicle ever occurred, it was an accomplished fact at the time the respective foreclosure sales took place. If Swindlehurst had a cause of action to remedy an alleged wrong, it was in full fruition no later than the time of those foreclosure sales.

In April of 1956 Swindlehurst commenced Ingham County Case No. 18,020 (3a). This was a suit on the contracts of insurance (3a). At that time plaintiff had one *cause of action* to remedy the alleged wrong. There were alternative remedies available. He could sue on a contract theory, or he could proceed in a tort action for conversion. He elected to sue for breach of contract. The trial court heard part of the proofs and ordered the entry of a judgment of no cause for action for American Fidelity Fire Insurance Company on the ground that this matter had been adjudicated in Ingham County Case No. 15,922 (3a). This was a final judgment on the merits. Plaintiff's motion for a new trial was denied (3a). No appeal was taken.

The present case (No. 18,884) was for conversion and was commenced in September of 1957 (3a). Case No. 18,020 and this case were based on the same *cause of action*, though each was brought in a different *form of action*. The difference in the respective *forms of action* is not important. The identity of the *cause of action* is all important. Everything Swindlehurst claimed he was entitled to in the way of recovery in the instant case brought in the *form* of a tort action, could have been recovered in Case No. 18,020.

In *Machen v. Budd Wheel Co.* (1933), 265 Mich. 530, 535, the Michigan Supreme Court quoted with approval

from *Harrison v. Remington Paper Co.,* (C.C.A. 8th, 1905) 140 Fed. 385:

> " 'When the second suit is upon the same cause of action and between the same parties as the first, the judgment in the former suit is conclusive in the latter as to every question which was or might have been presented in the former.' "

See also the following from 30A *Am. Jur.* 409, Sec. 366 of Judgments.

> "The application of the doctrine of res judicata to identical causes of action does not depend upon the identity or differences in the *forms* of the two actions. A judgment upon the merits bars a subsequent suit upon the same *cause,* though brought in a different *form* of action, and a party therefore cannot, by varying the *form* of action or adopting a different method of presenting his case, escape the operation of the principle that one and the same *cause* of action shall not be twice litigated." (Emphasis ours).

We would also point out the following statement from Section 48, *Restatement of the Law of Judgments,* page 191:

> "Where a valid and final personal judgment is rendered on the merits in favor of the defendant, the plaintiff cannot thereafter maintain an action on the original cause of action."

Plaintiff's entire claim was litigated in Case No 18,020. All rights possessed by Swindlehurst were fully determined in that case. If the trial court was in error in 18,020, plaintiff should have appealed. Having failed to avail himself of his right of review, he is forever barred from relitigating his claim. The Michigan Supreme Court in *Machen v. Budd Wheel Co.,* supra, said on pages 535-536:

> "The doctrine of 'res judicata' rests upon the principle that a question once determined by a court of competent jurisdiction by a judgment on the merits is

forever settled so far as litigants and those in privity with them are concerned. * * *".

The Michigan Supreme Court and Court of Appeals are made up of honorable and distinguished jurists who are well able to distinguish between questions of fact for a jury and rules of law. It was decided in this case that plaintiff's claim was barred as a matter of law and that there was no fact question for the jury. That a state appellate court can reverse a lower court jury verdict for a plaintiff and order the entry of a judgment of no cause for action for a defendant is so obvious that no further citation of authority is needed.

C. Additional Grounds For Denying Petition for Writ of Certiorari

1. Petitioner Failed to Comply With United States Supreme Court Rules

Petitioner has not complied with the requirements of Rule 23, and especially with subrule 23.1(f). As is implicit from the foregoing, it is evident that petitioner has raised no real federal question. The two items on page 6 of the petition that he claims raise a federal question are vague and indefinite. The second of the two items purports to be a quote from the application for leave to appeal to the Michigan Supreme Court. In fact, it is a conglomeration of portions of his amendment to application for leave to appeal as well as some new matter.

Nor has petitioner complied with subrule 23.1(h). That subrule requires that the petitioner, in a direct and concise argument, amplify the reasons relied on for allowance of the writ. The closest petitioner comes to this requirement is on page 12 of the petition. The first paragraph on page 12 deals with the alleged violation of the Seventh Amendment. This has been treated above. In the second paragraph petitioner paints with a broad brush and asserts that 60.000,000 motorists are now subject to the loss of their vehicles without recourse. This ignores the facts in this

case. The totality of petitioner's problems stem from, and are directly traceable to, his stubborn refusal to pick up his vehicles and pay the deductible amount due for the repairs.

On pages 2 and 3, under the jurisdiction section of the petition, it is claimed there is diversity of citizenship in that plaintiff is a resident of Michigan and American Fidelity Fire Insurance Company is a New York corporation. Petitioner is correct insofar as the residences of Swindlehurst and American Fidelity Fire Insurance Company are concerned. This respondent is at a loss, however, as to what diversity of citizenship has to do with this petition for writ of certiorari. This case was never in a federal court. Petitioner seeks review on a writ of certiorari. Diversity of citizenship has nothing to do with a petition for writ of certiorari to review a state court decision. For the record, we would point out that there was not complete diversity since Henry Sales was a resident of Michigan.

2. Petition for Writ of Certiorari Not Timely Filed

The petition for writ of certiorari was not timely filed. On November 7, 1966 an order was entered by the Michigan Supreme Court denying petitioner's application to reconsider the order of July 11, 1966 denying leave to appeal (11a). The last day for filing the petition for writ of certiorari was February 6, 1967. Petitioner's Notice for Filing Petition for Writ of Certiorari and Contents of Record states that the petition was filed in the United States Supreme Court on February 25, 1967. That was nineteen days beyond the last day for filing the petition, and some seven and one-half months after the Michigan Supreme Court denied petitioner's application for leave to appeal on July 11, 1966.

On February 9, 1967 an Order Extending Time to File Petition for Writ of Certiorari was entered by the United States Supreme Court. The time for filing was extended to March 6, 1967. The order went on to say that the extension was "without prejudice to the Court's consideration of

whether this application has been filed in time." This matter has been in litigation since 1951, and this particular case since 1957. Petitioner's delay in filing his petition is not justified. Subrule 22.4 states that applications for extensions of time for filing a petition for writ of certiorari are not favored.

3. Matters Not Accurately and Fairly Presented

a. Interlocutory Order of Michigan Supreme Court in 1958 Not Final Order

In four separate places in the petition (page 3, paragraph (5); page 8, paragraph (5); page 10, last paragraph at bottom of page; page 11, paragraph commencing at bottom of page) reference is made to this respondent's 1958 application for leave to appeal to the Michigan Supreme Court following the trial court's denial of the motion to dismiss. Petitioner apparently would have this Court believe that the denial of that application was an affirmance of the trial court and a final rejection of the defense of res judicata. Nothing could be further from the truth. Prior to January 1, 1965, when Michigan's intermediate appellate court (Court of Appeals) came into being, the Michigan Supreme Court consistently held that the denial of an application for leave to appeal to the Supreme Court was not an affirmance of the order sought to be reviewed.

> "* * * We do not construe the denial of an application for leave to appeal as foreclosing litigants from ultimate review of interlocutory orders on appeal in the principal case. The denial of an application for leave to appeal is ordinarily an act of judicial discretion equivalent to the denial of certiorari. It is held that the denial of the writ of certiorari is not equivalent to an affirmation of the decree sought to be reviewed." *Malooly v. New York Heating & Ventilating Corp.* (1935), 270 Mich. 240, 247. See also *Great Lakes Realty Corp. v. Peters* (1953), 336 Mich. 325;

American Eutectic Welding Alloys Sales co. v. Grier (1961), 363 Mich. 175.

b. Michigan Supreme Court Order of July 11, 1966 Affirmed Conclusion and Result Reached by Michigan Court of Appeals

In denying Swindlehurst's application for leave to appeal, the Michigan Supreme Court stated in its order of July 11, 1966:

> "* * * the application for leave to appeal is considered, and the same is hereby DENIED, for the reason that while this Court does not concur with the reasoning by which the Court of Appeals reached its conclusion, nonetheless the Court is persuaded that the result reached by the Court of Appeals is correct."

Petitioner asserts on page 10, paragraph (12), that the Michigan Supreme Court thereby rejected the defense of res judicata, but sustained the result on the basis of the garage-keeper's foreclosure sales. This respondent is unable to comprehend the process by which petitioner reaches this startling conclusion. There is nothing in the record to support this contention. The order simply says that the "Court does not concur with the *reasoning* by which the Court of Appeals reached its *conclusion* * * *." However, the *result* reached by the Court of Appeals is correct."

The *conclusion* reached by the Court of Appeals was (1) plaintiff's cause of action against American Fidelity Fire Insurance Company was barred by res judicata, and (2) he failed to establish a prima facie case of conversion against Henry Sales. The *result* reached by the Court of Appeals was to order the entry of a judgment of no cause for action for American Fidelity Fire Insurance Company and Sales.

Conclusions are reached through a reasoning process. It is perfectly obvious that a conclusion can be correct even

though the reasons assigned for that conclusion are incorrect. It is fallacious to assume and argue that the conclusion of the Court of Appeals was wrong because the reasons for that conclusion may have been wrong. The order of July 11, 1966 merely states that the Supreme Court does not concur in the reasoning. At no time does the order say, or intimate, that the conclusion and result are in any way erroneous. On numerous occasions the Michigan Supreme Court has affirmed a trial court where the trial court arrived at a correct conclusion even though the reasons for the conclusion were erroneous. *Miller v. Kretschmer* (1965), 374 Mich. 459; *Queen Insurance Co v. Hammond* (1965), 374 Mich. 655.

c. No Prejudice

Petitioner contends on page 3, paragraph (5), of the petition that there was bias in favor of American Fidelity Fire Insurance Company and prejudice against petitioner. The prejudice is claimed to have stemmed from petitioner's name. It is contended that the Michigan courts were influenced by the first two syllables of petitioner's name, and that this prejudice deprived him of his right to the jury verdict. By this ruse, petitioner has called into question the integrity of the Michigan Supreme Court and the Michigan Court of Appeals. It is indeed unfortunate that he has seen fit to resort to the ill-advised and unfounded accusation.

CONCLUSION

For the reasons heretofore stated, respondent American Fidelity Fire Insurance Company respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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